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No. 89-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRY G. JOHN, As an Individual; HARRY G. JOHN, As Trustee, Director and Officer of De Rance, Inc., and as a Director of Sante Fe Communications; De Rance, Inc., through its Founder and Sole Contributor, Harry G. John; and SANTE FE COMMUNICATIONS, through its Founder, Harry G. John, in a Derivative Capacity,

Petitioner,

v.

THE HONORABLE MICHAEL J. BARRON, Individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; ERICA J. JOHN; WILLIAM CANNON; THOMAS CANNON; DOES I THROUGH XX, INCLUSIVE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that the district court's imposition of Rule 11 sanctions was not an abuse of discretion, where the petitioner supplied no documentation of conspiracy and justified his investigation with conflicting sworn statements and unresponsive submissions that raised further unsupported allegations.

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HARRY G. JOHN, As an Individual; HARRY G. JOHN, As Trustee, Director and Officer of De Rance, Inc., and as a Director of Sante Fe Communications; De Rance, Inc., through its Founder and Sole Contributor, Harry G. John; and SANTE FE COMMUNICATIONS, through its Founder, Harry G. John, in a Derivative Capacity,

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THE HONORABLE MICHAEL J. BARRON, Individually and in his official capacity as Judge of the Circuit Court of Milwaukee County, State of Wisconsin; DONALD A. GALLAGHER; ERICA J. JOHN; WILLIAM CANNON; THOMAS CANNON; DOES I THROUGH XX, INCLUSIVE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION[1]

OPINIONS BELOW

The petition omitted one material opinion below:

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[1] This brief is submitted jointly by four of the respondents: Donald A. Gallagher, Erica P. John, William Cannon and Thomas Cannon.

The opinion of Judge Terence T. Evans dated April 7, 1989 (R. App. 1a).

STATEMENT OF THE CASE

This petition stems from the attempted relitigation in federal court of an adverse state court ruling by the disgruntled losing party, who was removed as trustee of a large charitable foundation for gross misconduct and fraud. The state court case is simultaneously before this Court now as the subject of a parallel petition for a writ of certiorari. *Harry G. John v. Erica P. John, et al.*, Case No. 89-1813, United States Supreme Court. In the federal proceedings—three separate civil rights actions under 42 U.S.C. § 1983—the petitioner alleged a corrupt conspiracy among the state court judge, the state appellate courts, the prevailing parties and their lawyers[2].

The United States Court of Appeals for the Seventh Circuit consolidated for disposition four separate appeals from a variety of rulings in the three civil rights cases, including the imposition of Rule 11 sanctions. The Seventh Circuit's March 8, 1990 consolidated disposition is the subject of the petition here (Pet. App. 1a). *John v. Barron*, 897 F.2d 1287 (7th Cir. 1990).

The petition contains more of the same misstatements of fact that the lower courts repeatedly rejected, as the orders and opinion contained in the petitioner's and the respondents' appendices show. The respondents will not reiterate them here[3] because they are not material to

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[2] In the petition we are advised that the conspiracy extends even farther than previously known, and includes the federal district judges and the members of the Seventh Circuit Court of Appeals as well (Pet. at 9-10).

[3] Respondents take seriously their obligation under S. Ct. R. 15.1 to correct misstatements of fact, but do not wish to add unnecessarily to the length of this responding brief. Suffice it to say that the following is a partial list of the more blatant falsehoods contained in the petition: that Archbishop Pio Laghi advised the

the resolution of the petition. The petition also misstates and omits procedural facts necessary to understanding why some issues raised in the petition are not properly before the Court. Accordingly, a summary of the complex procedural record is necessary.

A. The State Court Litigation

Harry John, the petitioner here, established De Rance, Inc. as a charitable foundation and funded it with a large gift of stock (Pet. App. 2a). De Rance contributed primarily to Catholic charities (Pet. App. 2a).

The three original directors of De Rance were Harry John and two of the respondents here, Donald Gallagher and Erica John, Harry's now ex-wife (Pet. App. 2a). In 1984, Erica John and Gallagher sued in Wisconsin state court to remove Harry John as trustee and director, alleging that Harry John had improperly caused De Rance to spend nearly $100 million in under one year to create a Catholic television network and to search for deep-sea treasure (Pet. App. 2a).

The state court judge, Circuit Court Judge Michael Barron (another respondent here), removed Harry John as trustee (Pet. App. 2a) and ordered him to disgorge over $1 million in illegal profits, *John v. John*, 153 Wis. 2d 343, 450 N.W.2d 795 (Ct. App. 1989). Judge Barron found that Harry John had engaged in a pervasive pat-

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state court plaintiffs to sue, instigated by Archbishop Rembrant [sic] Weakland and Peter Grace (Pet. at 5); that Judge Barron had been employed by Archbishop Weakland (Pet. at 7); that $5 million of De Rance money was spent on legal fees (Pet. at 8); that Judge Barron assigned his former law partner to hear the John divorce action (Pet. at 9); that Judge Evans had been a partner of the defendant attorneys (Pet. at 9); that the closeness of the Milwaukee legal community encompasses the Seventh Circuit Court of Appeals in Chicago (Pet. at 10); that the Milwaukee County clerk assigned Judge Barron out of order (Pet. at 21); and that Judge Barron admitted he was employed by Archbishop Weakland or gave him legal advice (Pet. at 22).

tern of gross mismanagement including securities fraud, tax fraud, perjury, self-dealing, conflicts of interest, and waste (Pet. App. 2a). The judge dismissed Harry John's counterclaim that Erica John, Donald Gallagher and others had conspired to oust him from De Rance (Pet. App. 2a). The Wisconsin Court of Appeals affirmed the trial court and the Wisconsin Supreme Court denied a petition for review (Pet. App. 2a-3a)[4].

B. The Federal Court Litigation

After Judge Barron's decision, Harry John filed the first of his three federal civil rights actions, *Barron I* (Pet. App. 3a). *Barron I* was voluntarily dismissed after six days (Pet. App. 17a). The respondents here sought Rule 11 sanctions.

The district court judge to whom *Barron I* was assigned, Chief Judge Robert Warren, imposed sanctions of $1,000 each against both Harry John and his lawyer, Thomas Jeffers, concluding that the case presented "one of the most outlandish and blatant violations of Rule 11" that the court had seen and that the allegations of the complaint were "nothing short of scandalous" (Pet. App. 20a).

Prior to the ruling, the district judge had ordered John and his attorney to submit a documented summary of their factual and legal inquiry (Pet. App. 17a). The court found that their submissions provided "no documentation whatsoever" for the alleged meetings or agreements and no documentation of inquiry into the role of the court clerk's office or the futility of a state appeal (Pet. App. 19a). The court concluded that the submissions were self-defeating, conflicting, rambling and hardly responsive (Pet. App. 19a).

On February 24, 1989, Judge Warren held a hearing to determine whether Harry John's attorney, Thomas

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[4] These matters are now before this Court in the related petition. *Harry G. John v. Erica P. John, et al., Case* No. 89-1813.

Jeffers, should be suspended from the practice of law in the Eastern District of Wisconsin. The court declined to suspend him from practice and referred the question of the amount of attorneys fees to District Judge Terence Evans, who was presiding in the nearly identical second lawsuit brought by Harry John, *John v. Barron II* (Pet. App. 3a, 24a).

In *Barron II*, Judge Evans dismissed the claims for injunction and equitable relief, finding the complaint in many respects "ridiculous" and replete with cavalier charges of extremely serious misconduct (Pet. App. 28a, 29a). The court dismissed Judge Barron as a defendant on the ground of judicial immunity (Pet. App. 34a-35a).

Judge Evans *sua sponte* declined to allow discovery on the "vague and perhaps slanderous [conspiracy] charge" until Harry John and his attorney "state[d] precisely what concrete evidence they have, or what evidence they expect to develop, that would support the naked claims of conspiracy that have been made" (Pet. App. 37a).

Judge Evans held a hearing on February 24 and March 1, 1989 to allow the petitioner and his attorney to reveal their proof (R. App. 2a). Judge Evans found that the petitioner had been given every opportunity but had not shown that "some, even slight, basis exist[ed] for the conspiracy claim," and foreclosed discovery (R. App. 10a). Upon the motion of the remaining defendants and after further submissions from Harry John, Judge Evans entered summary judgment against Harry John (Pet. App. 41a, 44a). The court held that the "allegations here are patently ridiculous" (Pet. App. 43a). The court also held that the complaint contained "reckless allegations for which Mr. John could offer no hint of support" (Pet. App. 41a).

A. The Decision of the Court of Appeals

After consolidating multiple appeals from rulings in *Barron I*, *Barron II*, and the third federal civil rights case (*Gallagher*), the court of appeals reached only four issues.

First, the court of appeals held that Judge Warren's *Barron I* order awarding fees but not fixing the amount of the award was not a final appealable order (Pet. App. 4a). Second, applying the deferential standard just upheld by this Court in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the court of appeals concluded that the record supported Judge Warren's decision to impose sanctions on both John and Jeffers (Pet. App. 7a).

Third, the court of appeals determined that the district court in *Barron II* properly dismissed Judge Barron (Pet. App. 7a). The court also noted that appeal no. 89-1027 raised other issues which the court declined to address due to its disposition of the case (Pet. App. 7a n.2).

Fourth, the court of appeals dismissed two of the appeals as a penalty for the perfunctory nature of the briefs in derogation of Fed. R. App. P. 28(a)(4) (Pet. App. 12a). One of the appeals dismissed for this reason (no. 89-2510) had arisen from *Barron II;* the other (no. 89-1848) had arisen from the third case, *Gallagher.*[5]

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[5] Possibly misled by the confusion of filings below, the court of appeals mistakenly referred to the two appeals dismissed under Fed. R. App. P. 28(a)(4) as *"Gallagher I"* and *"Gallagher II"*. According to the appeal numbers, however, the dismissed appeal came from *Barron II* and from *Gallagher.*

REASONS FOR DENYING THE PETITION

This petition looks deceptively ordinary but actually presents a quagmire of procedural problems. The petition presents no special and important issues warranting review. The lower court ruling creates no direct conflict between circuits and reaches no significant federal questions. *See* S. Ct. R. 10. The petition is inaccurate and unclear. *See* S. Ct. R. 14.5. Most of petitioner's issues were not raised or not properly raised below. *See Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

I. THIS COURT HAS DETERMINED THAT RULE 11 JURISDICTION EXISTS AFTER VOLUNTARY DISMISSAL.

Petitioner contends that the circuits are split on the issue of whether a district court may impose Rule 11 sanctions following a complaint's voluntarily dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i) (Pet. at 14-15). Subsequent to the filing of the petition in the instant case, the Court decided this very issue in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990).

This issue was not addressed by the court of appeals below. The court of appeals found that there was no final appealable order and, consequently, the legal issue of the propriety of the imposition of sanctions after voluntary dismissal was not before it.

This case presents no facts distinguishing it from *Cooter & Gell*. Although the underlying lawsuit here was dismissed after six days and the suit in *Cooter & Gell* was dismissed after six months and after the defendants had filed a motion to dismiss, the rule of *Cooter & Gell* does not depend upon the active life of the lawsuit. The "violation of Rule 11 is complete when the paper is filed." 110 S. Ct. at 2455, *quoting Szabo Food Service, Inc. v. Canteen Corp.*, 834 F.2d 1073, 1077 (7th Cir. 1987).

II. THIS COURT HAS DETERMINED THAT DEFERENTIAL REVIEW OF RULE 11 ORDERS IS APPROPRIATE.

Petitioner claims (Pet. at 19-20) that the lower courts erred in reviewing the Rule 11 prefiling factual inquiry because they failed to give special weight to the fact that this was a § 1983 conspiracy case. The petitioner also claims (Pet. at 19) that the court of appeals' decision is in conflict with decisions of the Ninth and Sixth Circuits in antitrust cases.

The question of special status for § 1983 filings was never raised in any court below. The petitioner has presented no authority concerning prefiling inquiry in § 1983 cases, nor likening § 1983 cases to antitrust actions, nor establishing a "split of authority." The petitioner has presented no cogent, clear argument on this point and, for this reason as well, the petition should be denied. S. Ct. R. 14.5.

The Sixth Circuit opinion upon which the petitioner relied neither holds that nor discusses whether Rule 11 requires a different standard in antitrust cases. *D & M Orthotics & Prosthetics, Inc. v. Sisters of Mercy Health Corporation*, Case No. 88-1945 (6th Cir. June 5, 1989), is an unpublished disposition that has no precedential value in the Sixth Circuit. *See* 6th Cir. R. 24(c).

In the Ninth Circuit case petitioner refers to, *Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors Association, Inc.*, 869 F.2d 1235 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 236 (1990), the court upheld the lower court's rejection of a Rule 11 motion because evidence supported the joinder of a party. The court stated in what might be characterized as dicta that the "antitrust aspects of this case also affect our determination," noting that the standard for proof of an antitrust conspiracy is "lenient." 869 F.2d at 1246.

Even if the Ninth Circuit's statements are not treated as dicta, the instant petition does not present a vehicle for the Court's review of the issue. The Ninth Circuit's suggestion is not in conflict with any other circuit; quite simply, the issue has not been examined and addressed in the various courts of appeal. The petitioner here, moreover, has presented no authority applying this dicta in § 1983 cases. Additionally, the court of appeals was never given the opportunity to consider this claim.

The issue here may well have been decided in *Cooter & Gell* in any event. In *Cooter & Gell*, an antitrust case, the Court held that a district court's finding of fact should be reviewed under a deferential standard. The Court explained that "to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case." 110 S. Ct. at 2459.

Under any type of review, under any level of scrutiny, under any special circumstances, the prefiling inquiry in this case was wholly inadequate. The district court found that the petitioner and his lawyer provided *no documentation whatever* of the claims in the complaint and, when attempting to justify the complaint, relied on contradictory sworn allegations and filed unresponsive submissions that raised further unsupported allegations.

III. THE DISCOVERY CLAIM IS NOT PROPERLY BEFORE THE COURT.

Petitioner asks (Pet. at 21) for a remand to the district court to conduct discovery. Petitioner contends (Pet. at i, 8) that he was denied discovery without a hearing.

The alleged denial of discovery was not properly before the court of appeals or, in any event, was not reached by the court of appeals. The alleged denial of discovery arose in *Barron II* (Pet. App. 37a and R. App. 10a). *Barron II* generated two appeals, appeal no. 89-1027 and appeal no. 89-2510. The court of appeals

dismissed no. 89-2510 because the brief was perfunctory in nature (Pet. App. 12a). The only issue in appeal no. 89-1027 that the court of appeals chose to reach was the issue of the immunity of Judge Barron (Pet. App. 7a, 7a n.2).

Moreover, the alleged factual premise of this issue is false. The district court denied discovery and dismissed the case in *Barron II* only after affording the petitioner the opportunity to make voluminous written submissions and lengthy oral argument (Pet. App. 37a, 41a and R. App. 10a). There was no unwarranted denial of discovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 11, 1990

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 88-C-340

HARRY G. JOHN, as an individual; HARRY G. JOHN, as a Trustee, Director and Officer of De Rance, Inc., and as a Director of Santa Fe Communications; DE RANCE, INC., through its Founder and Sole Contributor, Harry G. John; and SANTA FE COMMUNICATIONS, through its Founder, Harry G. John, in a derivative capacity,

Plaintiffs,

v.

DONALD A. GALLAGHER; IDELLA GALLAGHER; ERICA P. JOHN; WILLIAM CANNON; and THOMAS CANNON,

Defendants.

ORDER

[Filed Apr. 7, 1989]

This is an action brought under 42 U.S.C. § 1983. All but one of the claims were dismissed in a decision dated December 15, 1988. The claim which remains is that Milwaukee Circuit Judge Michael J. Barron, who was dismissed from the suit based in part on his absolute immunity from damages in a civil rights action, conspired with Donald and Idella Gallagher, Erica P. John, William Cannon, and Thomas Cannon to deprive Harry John of his constitutional rights. In the December 15 decision I noted at length the troublesome nature of the claim and determined that no discovery would be allowed until Mr. John and his attorney Mr. Thomas Jeffers had

demonstrated some basis for the "naked claims of conspiracy" made in the complaint. A hearing was held on February 24 and March 1, 1989. Mr. Jeffers argued on behalf of Harry John; attorneys Charles Clausen and Stephen Kravit argued the case on behalf of the various defendants. The scope of discovery in this lawsuit is the subject of this decision. In addition, the defendants have filed a motion for summary judgment dismissing the remaining claim.

The issues are whether a restriction on discovery under the unique circumstances of this case is a proper exercise of judicial control over litigation; and, if so, what should happen next.

Ordinarily, under rule 26 of the Federal Rules of Civil Procedure, the scope of discovery is broad. However, rule 26(c)(1) provides for protective orders:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; . . . .

Orders that "discovery not be had" are more common as to interrogatories and requests to produce than for depositions. *See* 8 Wright & Miller, *Federal Practice and Procedure:* Civil § 2037.

However, this case is unusual both in the outlandish nature of the claims and in the unrestrained and undisciplined manner in which the claims are pursued. In my December decision, I quoted some of the more troublesome allegations from the complaint. I will repeat

some of the relevant passages here. Paragraph 25 states:

> ERICA P. JOHN consulted attorney THOMAS CANNON many months before October 5, 1984, with regard to his representing her. THOMAS CANNON was a teacher at Marquette University, and had a small law practice in his home, having no formal office. He saw an opportunity to gain control of De Rance. THOMAS CANNON strongly felt that he could control ERICA P. JOHN as she had a strong hatred for her husband, HARRY G. JOHN, and wanted him destroyed. THOMAS CANNON enlisted the services of his brother, WILLIAM CANNON.

Paragraph 27:

> Prior to October 1984, various meetings were held by THOMAS CANNON, WILLIAM CANNON, ERICA P. JOHN, DONALD A. GALLAGHER (through their attorneys, and agents, and conspirators) and JUDGE MICHAEL BARRON, wherein JUDGE BARRON agreed in advance to join the conspiracy, and that when a suit was filed against HARRY G. JOHN, he would arrange that the case be assigned to him; and he would rule against HARRY G. JOHN no matter what the evidence showed. On October 5, 1984, ERICA P. JOHN and DONALD P. GALLAGHER filed a lawsuit as individuals, not as a corporation lawsuit, a copy of which is attached hereto and marked EXHIBIT "1", in which they alleged that HARRY G. JOHN had wasted the assets from $188,000,000.00 in 1983 to below $83,000,000.00 as of October 4, 1984. ERICA P. JOHN and DONALD A. GALLAGHER both signed the Complaint and verified it under oath.
>
> . . . .

They had already been assured that JUDGE MICHAEL J. BARRON would be assigned to the case and would give DONALD A. GALLAGHER and ERICA P. JOHN all the protection they needed to carry out the lawsuit and that, in the end, JUDGE BARRON would rule against HARRY G. JOHN.

. . . .

Arrangements were made with the County Clerk to assign the case to JUDGE BARRON out of order. The procedure of the County Clerk's office in Milwaukee County is to have little colored slips, approximately two inches square, stacked in rotation, so as a case is filed, the judge's court is on one of these slips that are supposed to be taken in rotation and put on each case as it was filed. JUDGE BARRON's slips were held back for over *fifty* cases. The case number was 650555, and the last previous case JUDGE BARRON had was case number 650505. The Clerk also held back the cases to assign JUDGE BARRON the case of a *John Miller v. DeRance, et al.*, which was a companion case.

. . . .

JUDGE MICHAEL J. BARRON was an agent of the co-conspirators, rather than an independent jurist acting in accordance with the laws of the State of Wisconsin, and should have disqualified himself from the case.

Paragraph 41:

Plaintiff feels it would be unproductive to take an appeal because THOMAS CANNON and WILLIAM CANNON'S father is a former Judge of the Milwaukee Circuit Court, and is a former Judge of the Court of Appeals. Further the Court of Appeals is physically very close to JUDGE MICHAEL J. BARRON and their offices are in the same building, within a few feet of each other, and that the Court

> of Appeals will do what it can to protect JUDGE BARRON and his orders.

I would not, of course, state that allegations that corruption exists in a judicial system are never to be believed. These particular claims, however, on their face tend to look, as attorney Clausen described them at the hearing, like claims made by former Wisconsin Senator Joseph McCarthy: they are based on no concrete evidence and evil conspiracies are found under every bed. How does the plaintiff know, for instance, what Thomas Cannon "strongly felt" or that Erica P. John has a "strong hatred for her husband." Where did the various meetings occur between Thomas and William Cannon, Erica John, Donald Gallagher, and Judge Barron in which the judge said he would arrange to have the case assigned to himself? How does plaintiff know that the Wisconsin Court of Appeals "will do what it can to protect JUDGE BARRON and his orders?"

Further casting doubt on the allegations is the number of times plaintiff repeats them in various forums. Two cases are pending in this branch of the court based on the same claims. I was informed at the hearing that another case is pending in the Superior Court for Los Angeles County. A case nearly identical to this one was filed before Judge Robert W. Warren of this district.

Judge Warren's case was voluntarily dismissed six days after it was filed. The defendants filed a motion pursuant to rule 11 of the Federal Rules of Civil Procedure. Judge Warren considered the allegations of the complaint "nothing short of scandalous." He had ordered that Mr. John and attorney Jeffers submit a "documented summary of the factual and legal inquiry made by each prior to the filing of the lawsuit." Judge Warren found that the summaries did not establish a reasonable inquiry into the alleged conspiracy involving Judge Barron and the other defendants.

My feelings here are similar to those expressed by Judge Warren. I was troubled by the allegations of the complaint and, especially after all claims but the conspiracy claims were dismissed, I wanted some assurance that the plaintiff had a basis in fact for his claims before I would allow him to plunge into the sea of discovery. I was troubled by the thought of compelling a sitting judge. who is immune from suit, to be deposed on the basis of highly inflammatory allegations that were not supported by any facts or inferences. But Mr. John maintains that he cannot prove his conspiracy without discovery. Nevertheless, I believed that he should not be allowed to rummage around and hope something turns up to support his conspiracy theory without first having a shred of concrete evidence on which to base his claim. For that reason, I held a hearing to allow the plaintiff to reveal some evidence in support of his claim.

During the hearing, I repeatedly attempted to keep Mr. Jeffers' attention focused on the issue: that is, because this is an action pursuant to 42 U.S.C. § 1983, requiring state action on the part of one of the conspirators, it is imperative that Mr. John show that Judge Barron was involved in the conspiracy. However, despite my attempts to keep the hearing focused, much of what Mr. Jeffers stated was that the named defendants, other than Judge Barron, were in a conspiracy of some sort: for instance, some of them met with a representative of the Pope in Washington, D.C. There was also a claim that the archbishop of Milwaukee was, for some reason, necessarily involved in the decision to sue Mr. John. These allegations were irrelevant to the inquiry.

Some claims against Judge Barron were articulated. However, those claims are either more properly appellate arguments, are refuted by affidavits filed by the defendants, or are based on not very compelling conjecture.

In the nature of appellate arguments are claims that Judge Barron removed Harry John as a trustee of the DeRance Corporation and that his reasoning in making that ruling was an "excuse." The result of the action filed in Milwaukee County circuit court was, in fact, that Harry John was removed as a trustee of DeRance. An appeals court will have a chance to review that decision to determine whether it was erroneous. An erroneous decision does not support a conspiracy claim under section 1983.

Much is made of a claim that Judge Barron was picked "out of order" to hear the circuit court case. Defendants submit affidavits to support their position that "out of order" makes no sense in regard to the assignment procedures in circuit court. Cases are assigned by pulling a tab with a judge's name from a randomnly arranged stock. There is no "order."

Plaintiff also states that Judge Barron was a member of the school board of the Archdiocese of Milwaukee for five years, and yet he did not disclose this fact to the litigants in circuit court. In his decision, however, Judge Barron himself mentions his service on the board. He was not hiding it. Furthermore, in Wisconsin a party may file a substitution against one judge assigned to a case and the case will be transferred to another judge. § 801.58, Wis. Stat. Any party could have removed Judge Barron from the case, yet no substitution was filed.

Plaintiff makes a claim that Judge Barron's service on the school board brought him into direct conflict with DeRance and Harry John. The facts, as revealed by plaintiff's own documents, show that in 1982, a conflict arose between DeRance and certain Catholic schools in Milwaukee. The schools refused a grant from DeRance because DeRance required that a certain catechism be used in the schools. Plaintiff contends that because Judge Barron was on the school board at the

time of that conflict, he should not have presided at the trial. However, when one examines the evidence, it turns out that the conflict was not between the school board and DeRance but between DeRance and the Central City Grade School Association, an organization of six central city schools. No evidence exists that Judge Barron was involved with the association.

There are also nebulous, not very convincing claims that Judge Barron, for one reason or another, *had to be* involved before the circuit court lawsuit was filed. The archbishop would not have let the case be filed, plaintiff claims, unless he knew what the outcome would be. And, plaintiff asks, how would the archbishop have known the outcome if Judge Barron were not involved from the beginning. Or, attorney Thomas Cannon, who represented Erica John in the circuit court trial, was smiling in the courtroom just before Judge Barron announced his decision; therefore, Mr. Cannon knew, before the fact, that he was going to win. These claims are absurd. I have watched the videotape of Judge Barron giving his decision. In the five minutes or so before the judge takes the bench, the spectators in the courtroom are talking with one another and smiling, as people do in courtrooms prior to the start of proceedings. Thomas Cannon smiled, but he was hardly the only person smiling. To say that he smiled because he knew he was going to win is not only ridiculous, but also just plain crazy.

During the more than two hours he was given to state the basis for his claims, Mr. Jeffers failed to reveal one concrete bit of evidence of a conspiracy involving Judge Barron. Yet he requests to depose the judge and the archbishop. This is a case which cries out for the exercise of judicial control. I am convinced that under my general mandate to control the litigation in my court, I have an obligation to prevent harassing and unwarranted discovery. I also am convinced that current de-

velopments in the law support my exercising close control over this case.

Rule 11 of the Federal Rules of Civil Procedure requires an attorney, before filing suit, to make a reasonable investigation into the facts and circumstances set forth in a pleading. The rule provides for sanctions for pleadings filed without reasonable investigation or with an improper purpose, such as harassment. The standard for judging whether the rule has been violated is an objective one: a court makes an "objective determination of whether a sanctioned party's conduct was reasonable under the circumstances." *Brown v. Federation of State Medical Boards of the United States*, 830 F.2d 1429, 1435 (7th Cir. 1987). An "empty head but a pure heart is no defense" where rule 11 sanctions are concerned. *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 181.

I am not at this time deciding whether rule 11 has been violated—that issue will be considered later—I simply note the rule as an indication that a court has an obligation to scrutinize claims, especially weird ones like those presented here, and protect litigants and witnesses from harassment.

While rule 11 may provide a remedy after the fact, another trend toward the protection of litigants is the relatively recent change in the standard for qualified immunity, which prevents harm, rather than providing a remedy for harm already done. It used to be that the standard for qualified immunity included an objective and a subjective element. *Wood v. Strickland*, 420 U.S. 308 (1975). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court determined that the requirement for subjective good faith contradicted an admonition in *Butz v. Economou*, 438 U.S. 478 (1978), that insubstantial claims should not proceed to trial. The Court determined that "bare allegations of malice should not

suffice to subject government official either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, at 817-818. In fact, the Court stated that until the immunity question is resolved, discovery should not be allowed. Then, carrying the principle further, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court determined that a denial of the qualified immunity defense, to the extent that it involves a question of law, is immediately appealable. The trend is to protect government officials from excessive disruption in the exercise of their duties, disruption stemming from the prosecution of insubstantial claims.

The evolution of the law of qualified immunity seems particularly instructive on the issue of the control of discovery. Judge Barron is entitled to an absolute judicial immunity from damages, not just a qualified immunity. However, because he is accused of conspiring with private citizens, he remains a central figure in the lawsuit. There can be no claims pursuant to 42 U.S.C. § 1983 without state action, that is, without Judge Barron's involvement. On the basis of naked allegations, unsupported by any substantial facts, should a sitting judge be required to submit to what would almost surely be a freewheeling deposition during which plaintiff would attempt to establish some toehold, no matter how precarious, on which to support his claim. I think not. To hold otherwise would make every judge a potential deponent in a suit filed by a losing litigant.

In this regard, it makes no sense to afford state actors an immunity from suit, but then make them suffer the humiliation and harassment of discovery, just because a plaintiff has used the word "conspiracy." Plaintiff here has been given more than ample time to convince me that some, even slight, basis exists for the conspiracy claim. He has failed to so do. There is simply nothing here. Under these circumstances, no discovery will be allowed.

This decision, I'm sure, sends the clear signal that summary judgment, as prayed for by the defendants in their March 1 submission, will probably be granted. It certainly seems to me that it does and that it should. Therefore, I intend to grant summary judgment unless the plaintiff files something in response to the pending motion within twenty days that leads me to believe that this case should continue to live.

SO ORDERED at Milwaukee, Wisconsin this 7 day of April, 1989.

BY THE COURT:

/s/ Terence T. Evans
TERENCE T. EVANS
United States District Judge